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PUBLIC UTILITIES
COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of)

PUBLIC UTILITIES COMMISSION)

Docket No. 2008-0274

Instituting a Proceeding to Investigate)
Implementing a Decoupling Mechanism)
for Hawaiian Electric Company, Inc., and)
Hawaii Electric Light Company, Inc., and)
Maui Electric Company, Limited.)
_____)

**HAIKU DESIGN AND ANALYSIS MOTION FOR LEAVE TO REPLY TO
HAWAIIAN ELECTRIC COMPANY, INC., HAWAII ELECTRIC LIGHT COMPANY,
INC., AND MAUI ELECTRIC COMPANY, LIMITED'S MEMORANDUM IN RESPONSE
TO THE MOTION TO INTERVENE OF HAIKU DESIGN AND ANALYSIS**

AND

**HAIKU DESIGN AND ANALYSIS REPLY TO
TO HAWAIIAN ELECTRIC COMPANY, INC., HAWAII ELECTRIC LIGHT COMPANY,
INC., AND MAUI ELECTRIC COMPANY, LIMITED'S MEMORANDUM IN RESPONSE
TO THE MOTION TO INTERVENE OF HAIKU DESIGN AND ANALYSIS**

AND

CERTIFICATE OF SERVICE

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(808) 572-2519

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

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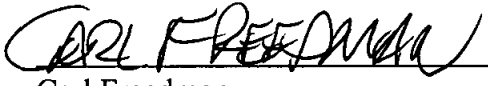
Hawaiian Electric Company, Inc., Hawaii Electric Light Company, Inc., and Maui Electric Company, Limited (Companies) filed the memorandum cited in the title above (Memorandum) opposing full party status for Haiku Design and Analysis (HDA) in this docket. HDA moved for and still seeks full party status in this proceeding. The Companies' arguments in the Memorandum are wrong both in points of fact and in points of law. HDA moves for leave to reply to the Memorandum.

HDA's Reply would address (1) the Companies's recommendation that the Commission should apply more stringent standards regarding allowing intervenor "party" status in this docket than the Commission has in past policy-making investigative dockets, and (2) inaccurate assertions of fact in the Memorandum.

HDA's Reply is attached and is incorporated here in this motion by reference for the purpose and to the extent that the Reply makes clear what is requested in this motion. The Reply is also provided now so as not to delay the proceeding should leave to reply be allowed.

Based on the foregoing, Carl Freedman, dba Haiku Design and Analysis, respectfully requests that the Commission grant this motion for leave to reply to the Memorandum or, in the alternative, render this motion moot by continuing to apply permissive standards for intervention in its policy-making investigative dockets and allow full party status to HDA and the other petitioners for intervention in this docket.

Dated: November 22, 2008; Haiku, Hawaii

Signed: 
Carl Freedman
dba Haiku Design and Analysis

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of)

PUBLIC UTILITIES COMMISSION)

Docket No. 2008-0274

Instituting a Proceeding to Investigate)
Implementing a Decoupling Mechanism)
for Hawaiian Electric Company, Inc., and)
Hawaii Electric Light Company, Inc., and)
Maui Electric Company, Limited.)
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REPLY TO

**HAWAIIAN ELECTRIC COMPANY, INC., HAWAII ELECTRIC LIGHT COMPANY,
INC., AND MAUI ELECTRIC COMPANY, LIMITED'S MEMORANDUM IN RESPONSE
TO THE MOTION TO INTERVENE OF HAIKU DESIGN AND ANALYSIS**

Hawaiian Electric Company, Inc., Hawaii Electric Light Company, Inc., and Maui Electric Company, Limited (Companies) filed the memorandum cited in the title above (Memorandum) opposing full party status for Haiku Design and Analysis (HDA) in this docket. HDA moved for and still seeks full party status in this proceeding.

A. The Commission should reject the Companies' recommendation to change the Commission's standards for allowing intervention as a party in policy-making investigative dockets.

The Companies recommend that the Commission should apply more stringent standards regarding allowing intervenor "party" status in this docket than the Commission has in past policy-making investigative dockets. For decades the Commission has been permissive in allowing intervention as a party in its policy-making investigative dockets. This practice recognizes the importance of allowing an open spectrum of contributions from

interested stakeholders when the Commission is setting its policies. This practice should not be changed.

The determination of who has the opportunity to fully participate in the broad policy-making proceedings before the Commission is a matter of great import. This is ultimately a constitutional matter. The Commission's ongoing practice of using contested case proceedings (rather than formal rulemaking proceedings) to decide broadly applied, innovative policies (rules) is well precedented, efficient and effective. This practice is constitutional and proper, however, only in conjunction with the Commission's historical, existing and hopefully ongoing accompanying practice of permissive allowance for intervention in its broad policy-making investigative dockets.

The Companies argue in the Memorandum that the Commission should now apply more restrictive standards in its policy-making dockets. The Memorandum cites standards used in several rate cases where the Commission disallowed intervention and allowed only limited participation without intervention.¹ All of the cases cited are rate cases with a single utility applicant. None of the cases cited identifies any examples or standards applied by the Commission in deciding against full intervenor status in an investigative docket.² The stricter standards cited from the rate case dockets evolved in Commission precedent and case law that applies to conventional "adjudicatory" contested case proceedings that typically have a single applicant or respondent and primarily consider facts and outcomes in

¹ Memorandum at pages 5 and 6.

² The Memorandum cites the Commission's Net Energy Metering Docket No. 2008-0084 as an example of the Commission limiting the scope of participation of a participant (Zero Emissions Leasing LLC) but in that docket the participant applied to the Commission to be admitted as a participant without intervention. The Commission did not

the context of explicit or implicit existing policies, conventions, rules or standards. The instant docket, however, is an investigative docket to be broadly applied to all investor-owned electric utilities in Hawaii with the purpose of determining new, innovative policies, conventions and standards. This is a policy-making docket, not a classic adjudicatory contested case.

There is an important and pertinent distinction between an agency's adjudicatory functions and its rulemaking functions. This distinction is recognized formally in the Administrative Procedures Act (APA) and derives ultimately from the division of powers in the Constitution's framework: between the Commission's executive and legislative functions. The APA distinguishes between the purposes and practices for contested case proceedings (for adjudication) and rulemaking proceedings (for setting policies). One clear difference between these types of proceedings is the matter of who is allowed to participate. Participation as a party in contested case proceedings is restricted to persons with an "interest" in the outcome of the proceeding. Participation in rulemaking proceedings is totally unrestricted. It is accepted (for now) that the Commission's use of contested cases to execute its rulemaking functions is proper but this does not mean that the underlying distinctions and principles embodied in the APA do not still exist. The Commission's practice of using contested cases to set its policies would become tenuous if access to fully participate in the proceedings is not permissive with equal standing of parties. Indeed, well accepted laws regarding administrative procedure (both APA statutes and supporting case

deny intervenor party status to any requesting petitioners in that investigative docket. (See Order No. 22535 in Docket No. 2008-0084 dated June 15, 2006.)

law) provide that rulemaking must be an open and unrestricted process, often requiring public notice procedures. In executing rulemaking functions agencies must be inclusive in what they hear.

The distinctions between adjudicatory and rulemaking functions are admittedly not always clear cut, especially for regulatory agencies like the Commission which must hear complex cases that apply to several large companies, but the distinctions are important nevertheless. It would be a mistake for the Commission to rely upon the Companies' recommendation to apply more restrictive standards regarding "standing" derived from adjudicatory contested cases to the Commission's policy-making investigatory dockets that are currently the Commission's most efficient and effective means to execute its rulemaking duties. If the Commission is not careful and is too restrictive in allowing access to its policy-making proceedings, a reviewing court might end up requiring that policy-making take place primarily in formal rulemaking proceedings (like many other agencies are required to do). The Companies (and the Commission) cannot have things both ways. If the Commission is going to set policy in contested cases it should be deliberately inclusive.

B. The Memorandum misrepresents the nature of the Agreement between the Companies and the Consumer Advocate regarding decoupling.

The Companies and the Consumer Advocate are signatories to the Agreement cited by the Commission in its Order opening this docket.³ By all appearances and according to a careful reading of the Agreement, the signatories are bound to the terms of the Agreement.

The Memorandum takes issue with HDA's assertion in its Motion to Intervene that

³ Order Initiating Investigation, October 24, 2008, Docket 2008-0274 at page 3.

“Each of the existing parties is bound by the terms of the Agreement and is therefore unable to represent any interests that are not consistent with the specific terms of the agreement.”⁴ The Memorandum makes light of the extent to which the signatories are bound to the terms of the agreement regarding decoupling and argues that the Consumer Advocate can therefore represent the interests of HDA. The Memorandum states that (1) “the HCEI Agreement contains nothing more than an agreement “in principle” regarding decoupling”⁵ and that (2) the Agreement “does not spell out any specific, substantive details regarding a decoupling mechanism.”⁶ The first statement is surprising and contrary to a straightforward reading of the Agreement. The second statement is simply wrong. The Agreement does spell out specific and substantive details, including an agreed timetable that has been adopted by the Commission in its order initiating this docket.

In supporting its claim that the Agreement is nothing more than an agreement in principle regarding decoupling and that the Agreement provides no specific, substantive details, the Memorandum cites several examples of provisions in the agreement that remain undetermined, ostensibly to be worked out in this docket. The cited examples of undetermined provisions regarding decoupling are (1) the Agreement does not identify which of the California utilities’ decoupling mechanisms will be closely tracked, (2) what cost tracking indices would be used and (3) whether the decoupling mechanism will be

⁴ HDA acknowledges now that this statement is not precisely correct in the respect that Kauai Island Utility Cooperative (KIUC) was named a party to this proceeding but is not a signatory. The thrust of HDA’s argument is pertinent nevertheless. HDA maintains that KIUC cannot effectively represent HDA’s interests in this docket nor should it be expected to do so.

⁵ Memorandum, second full paragraph at 9

⁶ Memorandum, first full paragraph at 9.

adjusted on a monthly, quarterly or annual basis.⁷ HDA asserts that the existence of these undetermined aspects of the Agreement does not support the Companies' argument that the Agreement exists only in principal and does not include specific, substantive terms. If this reasoning is the basis for the Companies' position it is wrong and misleading in face of the other clear terms in the Agreement. In particular, Section 28 of the Agreement includes the following agreed specific, substantive details:

- "The revenues of the utility will be fully decoupled from sales/revenues beginning with the interim decision in the 2009 Hawaiian Electric Company Rate Case (most likely in the summer of 2009)."⁸
- "The utility will use a revenue adjustment mechanism based on cost tracking indices such as those used by California regulators for their larger utilities or its equivalent and not based on customer count."
- The decoupling mechanism will incorporate operational attrition adjustments.
- The decoupling mechanism will incorporate financial attrition adjustments.

It is clear that the Agreement includes agreements on several categorical positions specifying detailed aspects of decoupling mechanisms, including when and in what context the mechanisms will be applied, what types of mechanisms will and will not be acceptable and specific components that will be included.

⁷ Memorandum at page 9.

⁸ The language in the Commission's initiating order on this point is not equivocal about what has been agreed by the signatories. On page 4 of its order the Commission states "the HECO Companies and the parties agreed that "the revenue of the utility will be decoupled ... (most likely in the summer of 2009)." The Commission did not characterize this provision as an agreement only "in principal". On the basis of this provision of the Agreement the Commission set an ambitious schedule to complete this docket by the time an interim order in the HECO Rate Case is issued. This is unarguably an agreed specific detail regarding decoupling.

It is HDA's position that it has not yet been determined whether these aspects of decoupling are in the public interest and, in fact, these determinations are the subject of the instant docket. HDA believes that there are good arguments for other decoupling mechanisms that are excluded from the specific terms of the agreement and that these should be fairly considered by the Commission. The fact that the Consumer Advocate has signed a binding Agreement that stakes out categorical positions precluding some types of decoupling that may be proposed is certainly pertinent to its ongoing ability to represent the interests of all stakeholders.

HDA does not need to argue here regarding whether the Consumer Advocate is or is not bound by the terms of the agreement. As argued above, the question of whether HDA's interests are differentiable from those represented by the Consumer Advocate is not as important in this investigative docket as they would be in a rate case or other more purely adjudicatory contested case.

The questions regarding the role of the Consumer Advocate and the extent to which the Consumer Advocate is bound by the specific terms of the Agreement are ultimately of great importance to the Commission and the Legislature. Clarity regarding this matter becomes necessary if the Commission finds it needs to determine the ongoing ability of the Consumer Advocate to represent the interests of consumers and the general public sufficiently to preclude intervention by petitioners in this docket or any of the other dockets that consider implementing the terms of the Agreement.

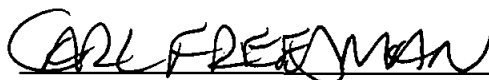
There is keen public interest regarding how the HCEI initiative generally and the

Agreement in particular will be examined and whether there will, at some point, be a thorough examination of the merits to determine whether these far reaching initiatives are in the best interests of the State. A pervasive question is whether the Consumer Advocate has already made its analysis, whether that analysis is sufficient to determine the State's interests, and whether the Consumer Advocate's analysis will be the only determining analysis entertained or allowed by the Commission in its deliberations. The stakes are enormous and amount to nothing short of a quadrupling of the capital investments in Hawaii's electrical energy infrastructure⁹ and a fundamental overhaul of the State's electric utility regulatory framework. Only some of the terms of the Agreement will be decided in this docket but, both in sum and in all parts, it is important to address things properly and get things right. In the instant policy-making investigative docket the Commission should welcome the broadest scope of contributions offered by petitioners and should exclude none on any pretense that the Consumer Advocate has exhausted necessary considerations to determine what is in the public interest.

Based on the foregoing, Carl Freedman, dba Haiku Design and Analysis respectfully requests the Commission to admit HDA as a party to this docket.

Dated: November 22, 2008; Haiku, Hawaii

Signed:



Carl Freedman, dba Haiku Design and Analysis

⁹ The current total gross value of all installed plant of all of the utilities and independent power producers in the State totals between three and four billion dollars. The capital value of the new investments contemplated in the HCEI and Agreement have not been finally determined but are estimated in the summaries of the supporting HCEI analyses to be approximately sixteen billion dollars.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Motion for
Leave to Reply and Reply upon the following entities, by causing a copy to be mailed,
postage prepaid, and properly addressed:

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Dated: November 24, 2008; Haiku, Hawaii

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